IN THE

Supreme Court of the United States

No. 265

OCTOBER TERM, 1958

ROBERT JOHN McNEIL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Robert John McNeil prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 14, 1958.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A, pp. 21-24 *infra*, is as yet unreported. Rehearing was denied without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1958. Proceedings on appeal, p. 20a. Rehearing was denied on June 11, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). On July 11, 1958 Mr. JUSTICE HUGO L. BLACK signed an order extending time to file petition for writ of certiorari to and including August 11, 1958.

QUESTIONS PRESENTED

1. Whether in a criminal case, in ruling on a motion for judgment of acquittal under Rule 29, F. R. Cr. P., a higher standard of evidence must be applied than that which must be met in order to present a prima facie case in a civil action.

2. Whether general instructions to a jury regarding its role as trier of fact are sufficient to correct a specific error in the charge misstating a material fact in summarizing the evidence in the case.

3. Petitioner had given police the name of one Jameson, who may have been implicated in possessing stolen goods. The record contains no evidence of what search was conducted for Jameson in the area where petitioner lived and where the stolen goods were found, or in the town from which the goods had been taken.

Whether the Court of Appeals for the Second Circuit enlarged beyond recognized limits the scope of the conclusions which a jury may draw from the evidence before it, in leaving to the jury the following successive "inferences": (1) that such a diligent search was conducted as to lead reasonably to the conclusion that Jameson did not exist, (2) that Jameson did not exist, (3) that therefore petitioner had lied in telling the police of Jameson.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 29, F. R. Cr. P., 18 U.S.C., Motion for Acquittal:

"(a) MOTION FOR JUDGMENT OF ACQUITTAL. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *"

STATEMENT OF THE CASE

A true bill was returned on February 13, 1957, charging that petitioner "on or about January 27, 1957 * * * did unlawfully have in his possession goods or chattels of a value in excess of $100.00, * * * which were moving in interstate commerce * * * and he knew these goods to have been stolen in violation of Title 18, Section 659, United States Code" (112).[1] This case came within the jurisdiction of the United States District Court for the District of Connecticut. A trial before HONORABLE J. JOSEPH SMITH, Chief Judge, and a jury, was had June 18-19, 1957 (1-111). At the close of the evidence offered by the government the defendant made a motion for judgment of acquittal (84-93), which was denied (93). The defense rested without putting on evidence (94). Its renewed motion for judgment of acquittal was denied (94). Exceptions were taken to the court's charge to the jury (107-109). After conviction a motion for judgment of acquittal, or in the alternative, motion for a new trial, was made (June 21, 1957) and denied (July 8, 1957) (117). Notices of appeal were filed (July 17, 22, 1957) (119, 121). Judgment and commitment were entered, July 19, 1957 (120); and amended, November 4, 1957 (135), to correct a clerical mistake.

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[1] Figures in parentheses refer to pages of the original record of the district court, which has been transmitted to the Clerk of the Supreme Court of the United States.

Since petitioner claims that there was not sufficient evidence against him to make out a prima facie case, all the facts in the trial record must be considered.

On January 25, 1957, the B. F. Goodrich Company at Watertown, Massachusetts (3) made, via the H. T. Smith Express Company, a shipment of 607 cases of rubber floor tile, valued at about $15.75 per case (4). Its destination was New York City (6). The shipment came to rest on Saturday, January 25, 1957, at the H. T. Smith Express Company terminal at Wallingford, Connecticut (11, 12, 15). It remained there until the evening of January 27 (16), when the trailer truck carrying it left for New York City (17). A count of the incoming shipment made at the New York terminal of the H. T. Smith Express Company on January 27, 1957 showed 505 cases to be on board the truck (23).

At or about 3:00 A. M., January 27, 1957, Lester M. Gavette (55), a neighbor of the defendant in North Haven, Connecticut, upon being attracted by a noise coming from the direction of the property where the defendant resided, called the police (57). Mr. Gavette testified that he was able to determine the cause of the noise, but not by whom it was made (58, 59). He saw on the premises where the defendant lived (34, 63) a truck partially unloaded, containing floor tile (58). One Baglieri had, and occasionally used, a right of way over the land where the truck was found (63, 64). Mr. Gavette also at that time saw some cases of floor tile in a building on the same premises which had formerly been used as a chicken coop (58).

On the same date, at approximately 3:53 A. M., an officer of the North Haven Police Department (29) found on the premises in question a suburban type truck belonging to the defendant (30, 42), in which were twenty-one boxes of floor tile (29, 30, 34). The rear marker plate on the vehicle had been turned up and could not be read (31). The motor of the truck was warm

and the keys were in the ignition (34). Eighty-one more boxes of tile were discovered in the chicken coop (30), making a total of 102 cases in all on the property (36). Some, but not all, of the windows of the chicken coop were covered (38).

The defendant in January, 1957, had requested of Mr. Gavette permission to use the chicken coop for the purpose of storing furniture. The defendant said he was going to Florida (56). Mr. Gavette was unable to say whether there was any change in the outward appearance of the building after the defendant had asked to use it (57). In early January the defendant had also asked Gilbert Hough (65), who was in business with Gavette, for some scrap lumber to put over the windows of the chicken coop (67). Mr. Hough did not testify as to whether he noted any change in the appearance of the coop, as far as the windows were concerned (67), after the defendant had requested the lumber, although he had "heard pounding on the chicken coop." (67) He did not see the defendant use the lumber (67). Subsequent to the defendant's request for scrap lumber Mr. Hough "did notice at one time that there was a padlock on the door." (68) Mr. Hough did not know how long the padlock was on the door of the chicken coop (69-70), or whether one had been on during the three months before his conversation with the defendant (69). There was no testimony as to who put the padlock on the door. The police officer who went to the scene in response to Mr. Gavette's call was not able to say whether the coop had been locked at any time (33). Nor does a padlock appear in a photograph (Exhibit F, p. 131 of the original record.) which shows the open doorway and the cases within the building, and in which the hasp on the door is visible.

The accused, when questioned by officers of the North Haven Police Department, said he did not know anything about the tile. (36, 37, 72). He said he did not know how the tile got to be in his truck or in the chicken coop; that he rented the chicken coop to one Chick Jameson, who also may have used

the suburban truck (46, 74, 75). Some attempt to find Jameson was made (48, 75, 82), including a check of "records of the New Haven Police Department, the information available to officers of that department, and the city directories, with no results." (82) The accused stated that on the night of January 26-27, 1957, he was playing cards at the Blue Bell Club at Grand Avenue and James Street in New Haven, operated by a man named Mickey Zello (47, 73). There is no evidence that the government made any effort to find anyone of that name, although some effort was made to find a man called "Mickey Mouse," who may have been the man called Mickey Zello (73). There is no evidence that the police attempted to find every person mentioned by the defendant as having been with him on the night in question (82, 83). The search made for "Mickey Mouse" was "through sources available, such as nick-names, nick-name files in the Police Department, with no result." (82)

Upon appeal to the Court of Appeals for the Second Circuit the conviction below was affirmed (App. A, pp. 21-24 *infra*). A petition for rehearing was filed. Rehearing was denied and the mandate stayed.

REASONS FOR GRANTING THE WRIT

As to the First Question Presented

1. THE "SECOND CIRCUIT DOCTRINE" IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

The test applied by the Court of Appeals for the Second Circuit in passing upon motions for acquittal under Rule 29, F.R.Cr.P., is that the standard of evidence for determining whether a prima facie case has been made out is the same for both civil and criminal cases:

> "* * * for it is the thoroughly established doctrine in this circuit that the only difference between a civil action

and a criminal prosecution is in the instruction that must be given to the jury that they must be convinced beyond all fair doubt."

United States vs. *Castro*, 228 F 2d 807, 808 (2d Cir. 1956).

See also *United States* vs. *Masiello*, 235 F 2d 279, 284-85 (2d Cir.), *cert. denied sub nom. Stickel* vs. *United States*, 352 U. S. 882 (1956);

United States vs. *Feinberg*, 140 F 2d 592, 594 (2d Cir.), *cert. denied*, 322 U. S. 726 (1944);

United States vs. *Valenti*, 134 F 2d 362, 364 (2d Cir.), *cert. denied*, 319 U. S. 761 (1943).

No other court of appeals has thus equated the standards in civil and criminal cases.

The late JUDGE JEROME N. FRANK strongly opposed the "Second Circuit doctrine" in concurring opinions in *Castro* (228 F 2d at 808-10) and *Masiello* (235 F 2d at 285-294), *supra*. Petitioner contends that the views of JUDGE FRANK on the subject of the standard which should be applied in ruling on motions for acquittal are the correct ones. His analysis is relied on extensively in the discussion which follows.

In considering the practices of the judicial circuits it must be made clear that merely giving names to whatever criteria are applied in passing on motions for acquittal does not aid the analysis. Particularly misleading is the term "substantial evidence test"; for all criteria in use must answer the ultimate question of what constitutes substantial evidence—i. e. that evidence which makes out a prima facie case against the defendant. Petitioner paraphrases the opinions of JUDGE FRANK in stating the following propositions: (1) In neither civil nor criminal matters should a trial judge withdraw a case from the jury's consideration if the side having the burden of proof has produced substantial evidence. (2) "Substantial evidence" should

have a different meaning in civil and criminal cases, because of the difference in the burden of proof.

Separate tests are therefore required in order to give meaning to "substantial evidence". Petitioner suggests that in a civil case substantial evidence be defined as "such evidence from which a reasonable jury could find the plaintiff's case proved by a fair preponderance." In a criminal case substantial evidence is "such evidence from which a reasonable jury could find guilt proved beyond a reasonable doubt." The Court of Appeals for the Second Circuit in *Castro* (208 F 2d 807-08) specifically rejected the latter test, and in so doing came into direct conflict with the Court of Appeals for the District of Columbia, which adopted such a test in *Curley* vs. *United States*, 160 F 2d 229, 232 (D. C. Cir. 1947), *cert. denied*, 331 U. S. 837 (1947). See also *Cooper* vs. *United States*, 218 F 2d 39, 41 (D. C. Cir. 1954); *Freidus* vs. *United States*, 223 F 2d 598, 599 (D. C. Cir. 1955); *Collis* vs. *United States*, 247 F 2d 566, 568 (D. C. Cir. 1957). The *Curley* doctrine has also gained favor in other circuits: *United States* vs. *Ginn*, 222 F 2d 289, 292 (3d Cir. 1955); *United States* vs. *Yeoman-Henderson, Inc.*, 193 F 2d 867, 869 (7th Cir. 1952); *United States* vs. *Thayer*, 209 F 2d 534, 538 (7th Cir. 1957).

Another definition of "substantial evidence" in criminal cases—"evidence of facts which exclude every hypothesis but that of guilt"—is offered by a standard long employed (often with differences of phraseology, sometimes in conjunction with other tests) by federal courts in testing the sufficiency of the government's case. *Seals* vs. *United States*, 221 F 2d 243, 249 (8th Cir. 1955); *Sapir* vs. *United States*, 216 F 2d 722, 724 (10th Cir. 1954); *Vick* vs. *United States*, 216 F 2d 228 (5th Cir. 1954); *Bryan* vs. *United States*, 175 F 2d 223, 227 (5th Cir. 1949), *aff'd on other grounds*, 338 U. S. 552 (1950); *United States* vs. *Russo*, 123 F 2d 420, 423; *Edwards* vs. *United States*, 7 F 2d 357, 360 (8th Cir. 1925) (See also cases cited in *United*

States vs. *Castro*, *supra*, 208 F 2d at 800 n. 4). Such a test, in directing the trial judge to consider any reasonable hypothesis of innocence, calls upon him to inquire analytically into the facts in evidence. Without question it gives greater scope to the trial judge's consideration of the sufficiency of the evidence than does the "Second Circuit doctrine", which holds the scope of inquiry to be the same in criminal as in civil cases.

The Court of Appeals for the Second Circuit in petitioner's case applied a standard which conflicts with considerable authority in other circuits. Moreover, the Supreme Court of the United States has recognized that different standards are applied in civil and criminal cases. In refusing to give res judicata effect in a civil action to the granting of a motion for acquittal in a criminal prosecution based on the same facts the Court held as follows:

> "In the present case the motions for judgment of acquittal raised the question whether the evidence overcame all reasonable doubt of the guilt of appellees. The ruling on them did not determine whether by the lesser degree of proof required in a civil case appellees might be found to have conspired to fix commissions."
>
> *United States* vs. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 493 (1950).

2. It Is Important That Rule 29 Be Applied Uniformly Throughout the United States.

Petitioner suggests that the due administration of criminal justice requires that all federal courts be guided by the same standard in ruling on motions for acquittal under Rule 29. In close cases the choice of standard can mean the difference between liberty and incarceration (or even life and death) for a defendant. Surely the result flowing from a given set of facts should not depend upon the venue in which the issue is tried. Involved here are crucial problems of the functions of judge and jury, the rightful place in the criminal process of the require-

ment that guilt be proved beyond a reasonable doubt, the significance of circumstantial evidence in passing on a motion for acquittal.

3. The Facts of This Case Present the Issue of the Validity of the "Second Circuit Doctrine".

Petitioner claims that in his case the application of the "Second Circuit doctrine" has resulted in a conviction under a state of facts which would require acquittal when judged by any other recognized test of the sufficiency of the evidence. The stolen goods in question were discovered shortly after having been brought on the scene. There is no evidence of the defendant's presence there, the only evidence of his whereabouts on the night and early morning in question being his own out-of-court alibi statement. There is no evidence that petitioner himself used his suburban truck at the crucial time—only his out-of-court statement that Chick Jameson had the use of the vehicle. A consideration of all the proof shows what is at most a constructive possession of the stolen goods, not that exclusive, conscious and personal possession which the *criminal law* requires in order to convict. This case is not one in which conviction can be justified "whatever nuances of doctrine are applied"; nor did the Court of Appeals state that it was such a case. *Cf. United States* vs. *Masiello*, 235 F. 2d 279, 285 (2d Cir.), *cert. denied sub nom. Stickel* vs. *United States*, 352 U. S. 882 (1956); *Stickel* vs. *United States*, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956).

As to the Second Question Presented

1. The Holding That General Instructions Regarding the Role of the Jury Cured a Material Misstatement of Evidence In the Charge Conflicts With the Decisions of Other Courts of Appeals and Those of the Supreme Court of the United States.

In the case at bar, in order to prove the essential element of possession, it was necessary for the government to establish that petitioner had control of the place where the stolen floor tile was found at the time the tile was found there. The trial court instructed the jury that it might infer that petitioner "had dominion, actual control of the chicken coop from the evidence * * * that there was then a padlock on the coop, although there had not been some time earlier." (A. 7)[2]

Petitioner excepted to this portion of the charge (A. 10), contending that there was no evidence that the padlock was on the coop at the time the stolen goods were found therein, that such evidence as there was concerning the padlock was not relevant to prove petitioner's control of the chicken coop. (All testimony concerning the padlock is printed in Appendix B, pp. 25-27 *infra*.)

The Court of Appeals for the Second Circuit did not dispute petitioner's claim that the questioned instruction contained prejudicial error, but evidently held that the charge was corrected because "the court repeatedly instructed the jury that their recollection of the evidence was to control." (App. A, p. 23 *infra*)

An examination of the charge in order to find substantiation for the last-quoted statement reveals the following:

> "You, the jury, are the sole judges of the fact. The law your will take from the charge of the Court." (A. 3)
>
> "The jury must reach its verdict solely upon the evidence before it in the case in the Court. And the jury may not consider any evidence which the Court has ordered stricken from the record before it." (A. 4)
>
> "In determining what the facts were in the case, you will reach your conclusion solely on the evidence presented her[e] in Court as to the crime here charged." (A. 5)

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[2] "A" refers to the Appendix for Defendant-Appellant as printed for the use of the court below.

"It is for you to say, however, from the evidence presented here whether the Government has sustained its burden of establishing those elements beyond a reasonable doubt." (A. 6)

"It is for you to say whether these inferences can reasonably be drawn from the testimony which you have heard here." (A. 7) (This last quotation immediately follows the portion of the charge stating that there was "evidence that there was then a padlock on the coop, although there had not been some time earlier.")

"You are not required to draw any such inference, but it is for you to say from the facts here whether you are justified in inferring that results [*sic*] from the facts which you find to have been established here before you by proof." (A. 7) (As to control of the truck by the defendant and his knowledge that the goods were stolen.)

"As I have said, it is for you to determine whether you may reasonably draw such inferences from the facts which you do find to have been established in that case as to what search actually was made, and whether there was any such person thoroughly searched for and not found, and whether the statement was made by the defendant." (A. 9). (As to the evidence concerning the suburban vehicle, its possible use by Chick Jameson, and the efforts made by police and Government agents to find him.)

Petitioner respectfully submits that the above-quoted statements from the charge contain no more than general instructions regarding the role of the jury; that the trial court gave no indication that if it misstated evidence in its charge the jurors were to disregard such misstatement and follow their own recollection. Instructions as to the jury's function as trier of fact did not distinguish the *evidence* as presented by witnesses from the evidence as summarized by the judge. The issue as to this point thus is not whether a trial judge may correct a misstatement of evidence in his charge by advising the jurymen that their recollec-

tion of the evidence, rather than the judge's summary is to govern their deliberations. It is instead whether general instructions as to the function of the jury as trier of fact can correct the trial judge's specific misstatement of evidence bearing on an essential element in the case (here control of the chicken coop).

On the issue as presented, other courts of appeals have ruled contrary to the holding of the Second Circuit in this case. The Court of Appeals for the District of Columbia in *Robertson vs. United States*, 171 F. 2d 345 (1948), held a misstatement of evidence in the charge to warrant reversal. There the charge contained the following language:

(74) "The burden [of proof beyond a reasonable doubt] has been met if the evidence satisfies you that the defendants are guilty to a moral certainty; in other words, that they are guilty beyond a reasonable doubt * * *

"Of course, if after an impartial comparison and examination of all the evidence in this case you can candidly say that you have a reasonable doubt as to the guilt of these defendants, or either one of them * * * it is your duty under the law to return a verdict of not guilty * * *

"You are the sole judges of the facts in the case, ladies and gentlemen of the jury, and in that respect *the Court cannot be of* (75) *any assistance to you whatsoever. It is for you to decide the weight you will give the testimony as you have heard it from the witness stand*, and you should weight carefully every fact and circumstance that has been submitted to you for your consideration. [Emphasis added.]

"You have had the opportunity of seeing the witnesses on the witness stand; also the defendant Hartis, who became a witness when he testified; and in determining whether to believe the testimony of any witness, and in weighing the testimony of any witness you may consider the demeanor of the witness on the witness stand; the witness' manner of testifying, the deportment of the witnesses on the stand, the way in which they answered questions propounded by

counsel for both sides; the apparent interest and bias of any witness, and the probability or improbability of the testimony as to the party giving the same, and its congruity or incongruity with other testimony * * *

(79) "Call upon your own experiences of life to determine which evidence you believe and which you disbelieve. Weigh it, analyze it, and sift it in order that you may reach a considered judgment."

(Figures refer to pages of original record.)

The Court of Appeals for the Sixth Circuit, reversing in *Smith* vs. *United States*, 230 F 2d 935 (1956), stated the proposition that, "It is error to issue instructions to the jury which assume as a fact material matters not established by the evidence." 230 F 2d at 939. In that case the trial court had outlined the function of the jury with respect to the evidence presented:

(627) "The law makes it the duty of the Court to give in its charge to the jury the applicable law of the case and the duty of you jurors to carefully weigh and consider all the evidence adduced, and apply it to the law as given you by the Court in making up your verdicts."

(628) "You jurors are the sole judges of the facts, and also the judges of the law as applies to the facts in the case, but cannot disregard the law as given you by the Court."

"* * * every fact and circumstance in the case you may consider in arriving at your verdicts."

(635) "It is for you jurors, as you understand, I am sure, to determine whether there was that honesty of intent or purpose in the mind of the defendant, Troy C. Smith, when the first loan herein was procured and what was in the minds of both defendants when the second loan herein was procured, or whether the representations and statements ascribed to the defendants have been shown to be false when made."

(643) "If, after a full consideration of the evidence in the case and the law as here given you by the Court, you find in line with the defendant * * *"

"Briefly, with respect to the loan of December 20, 1952 * * * You have heard this proof, and I believe from the proof this is the defendant, Troy Smith's contention in that connection." (644)

(645) "If, after a careful consideration of the evidence and the law, you accept these contentions of the defendant, Troy Smith * * *"

(646) "If, after a careful consideration of the evidence and law, you agree with the contentions of the defendant, Evander Smith * * *"

(648) "You will take all the evidence adduced by the Government and by the defendants, and give it a full, fair and impartial consideration. If there are conflicts in the statements of witnesses, it is your duty to reconcile them if you can, for the law presumes that every witness has sworn to the truth; but if you cannot, the law makes you the sole and exclusive judges of the credibility of witnesses and the weight to be given their testimony."

(654) "With these general principles firmly fixed in your mind you will apply them carefully to the facts and circumstances of this case under the law as given you in these instructions."

(Figures refer to pages of original record.)

Petitioner contends that in both *Robertson* and *Smith* the instructions concerning the role of the jury in passing upon evidence were at least as clear as those given in the case at bar; that in particular the italicized quotation from *Robertson*, (p. 13 *supra*) came much closer to informing the jury that it was to use its own recollection of the evidence than did any part of the charge in the case at bar. All three courts were confronted with errors in summarizing evidence in the charge. Whether the

misstatement in petitioner's case was of such a nature as to be considered plain error, as were those in the other two cases, is not in issue. Petitioner by due exception called the attention of the trial court to the error and asked that specific correction be made. In holding that he was not entitled to have a specific correction made, the decision of the Court of Appeals for the Second Circuit conflicts with decisions of the courts of appeals of the District of Columbia and Sixth Circuit on the same subject.

The Supreme Court of the United States has held that it does not presume that lay jurors will, uninstructed to do so, take it upon themselves to correct an error made by a learned jurist. *Starr* vs. *United States*, 153 U. S. 614, 626 (1894); *Quercia* vs. *United States*, 289 U. S. 466, 470 (1933); *Bollenbach* vs. *United States*, 326 U. S. 607, 612-14 (1945); *Bihn* vs. *United States*, 328 U. S. 633, 637 (1946). "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* vs. *United States*, *supra*, 326 U. S. at 613. *A fortiori*, it should not rest on an instruction such as the one here in question, which is not equivocal, but simply wrong.

Surely the government's case would have been materially weakened had the jury found itself unable to conclude that petitioner had *exclusive control of the coop at the time the stolen tires were found there.* It is probable that the erroneous instruction that the jury might consider evidence "that there was then a padlock on the coop, although there had not been some time earlier" was a substantial factor in the jury's drawing the inference that petitioner did have such control. In holding the error cured, the Court of Appeals for the Second Circuit runs counter to the doctrine that "an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial." *McCandless* vs. *United States*, 298 U. S. 342, 347-48 (1936); *Kotteakos* vs. *United States*, 328 U. S. 750, 760-66 (1947); *Bihn* vs. *United States*, *supra*, 328 U. S. at 638; *Fisch*

vs. *United States*, 329 U. S. 211, 218 (1945); *Krulewitch* vs. *United States*, 336 U. S. 440, 444-45 (1949); *United States* vs. *Grady*, 185 F 2d 273, 275 (7th Cir. 1950); *United States* vs. *Meagley*, 239 F 2d 637, 639 (7th Cir. 1957).

2. Protection of the Rights of Parties In General Requires An Examination of the Rule Which Enabled the Court of Appeals to Find the Error In the Charge Cured.

The Court of Appeals denied a petition for rehearing which challenged the finding that the trial court had "repeatedly instructed the jury that their recollection of the evidence was to control." Petitioner maintains that this finding can with equal ease be made in any case where the judge gives the usual general instructions regarding the jury's task in drawing inferences and finding facts. The doctrine that specific errors are cured by such general instructions means that trial judges in the Second Circuit may refuse to correct material misstatements of evidence even though parties request that correction be made. Petitioner claims that minimum standards of judicial procedure, in civil and especially in criminal cases, require that if no specific correction is made the trial judge must include in his charge a clear expression that in the event of a disparity between the facts as he recounts them and the facts as recollected by the jury the latter interpretation must control. It is submitted that the action of the Court of Appeals for the Second Circuit in this matter has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

As to the Third Question Presented

The Court of Appeals Sustained an Instruction Which Allowed the Jury To Draw Conclusions Based Upon Speculation.

Petitioner told officers of the North Haven Police Department that his truck may have been used by one Chick Jameson at the time in question. All the evidence which is indicative of what efforts were made by law enforcement officers to find Jameson is set forth below (All the evidence in the case concerning Jameson is printed at App. B, pp. 27-28 *infra*.)

(Examination of Arthur Kane, a sergeant of the North Haven Police Department.)

(46) Q. Whether or not you made an investigation to find the person? A. Yes, we did, and we could not locate him. * * *

(47) Q. Were you able to locate him, Sergeant? A. We were not.

(Examination of Thomas J. Nerreau, a sergeant of the North Haven Police Department.)

(75) Q. Did you make any attempt yourself, Mr. Nerreau, to locate any of the people that the defendant advised you were with him or this man Jameson? A. Yes, sir.

Q. Were you successful? A. No, sir.

(Examination of Francis X. Fust, Special Agent of the Federal Bureau of Investigation.)

(82) Q. In the process of your investigation of this floor tile matter, whether or not you attempted to find Chick Jameson? A. Yes, I did.

Q. What method did you use, sir? A. We checked records of the New Haven Police Department, the information available to officers of that department, and the city directories, with no results.

(Figures refer to pages of original record.)

Petitioner in his motion for acquittal stated the contention, which he still makes, that the only possible probative effect of the testimony quoted above was to show why the government did not produce Chick Jameson as a witness in its behalf (Original

Record, pp. 89-90). Exception was taken[3] to that portion of the charge which allowed the jury to draw the following three successive "inferences": (1) that such a diligent search was conducted as to lead reasonably to the conclusion that Jameson did not exist, (2) that Jameson did not exist, (3) that therefore petitioner had lied in telling the police of Jameson.[4] Petitioner contends that upon the record in this case these conclusions could be reached only through speculation, not by a process of inference.

It is not every failing effort, however scant, to find an individual, which will justify a jury in concluding that that person is not in existence. "So, too, fictitious nature of a name, or the non-existence of an alleged person of a certain name and residence, may be evidenced by the failure to find any such person after *diligent search*." [Emphasis added.] 1 Wigmore, *Evidence* (3d ed. 1940), 158. Appellant contends the required search must be proved by direct testimony of those having personal knowledge of what search was made; it may not be proved circumstantially. In any event, the bare say-so in court by North Haven police officers that they tried unsuccessfully to find Jameson gave no basis for inferring that they had conducted a diligent search. The same is true of the testimony of the F.B.I. agent that "We checked records of the New Haven Police Department, the information available to the officers of that department, and the city directories, with no results"—especially where the goods were stolen from Wallingford and found in North Haven and there is nothing in the case to indicate that Jameson was said to have been in New Haven.

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[3]The brevity required in this petition precludes a discussion of the dictum of the Court of Appeals (App. A, p. 24) regarding the specificity of the exception. Petitioner argued this point in his Petition for Rehearing in the court below at pp. 8-10.

[4]The portion of the charge involved here is printed in Appendix for Defendant-Appellant, p. 9, and is quoted in the opinion of the Court of Appeals (App. A, pp. 23-24).

It is significant that the Court of Appeals in summarizing the proof in the case did not find that the government had produced evidence from which it could have been inferred that there "was no such person in existence, and that that explanation of the possession by another of the car is without foundation." The court was correct in stating that "the jury was at liberty to disbelieve appellant's statements." (App. A, p. 23.) This means only that the jury under a proper charge might have rejected petitioner's explanation and given it no weight in his favor. Instead of being instructed to this effect, however, the jury was permitted to convert petitioner's explanation into substantive evidence against him.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLIOTT R. KATZ,
HOWARD A. JACOBS,
RICHARD L. JACOBS,
Counsel for petitioner.

August 7, 1958.

APPENDIX A

[Caption omitted in printing.]

Before: SWAN, HINCKS and MOORE, *Circuit Judges*.

On appeal from the United States District Court for the District of Connecticut, J. Joseph Smith, *Judge*. Affirmed.

PER CURIAM:

Appellant was convicted upon verdict of a jury for violation of 18 U. S. C. A. §659 (possession of goods stolen from an interstate shipment, knowing the same to have been stolen) and was sentenced to six months imprisonment. He offered no evidence at the trial but moved for acquittal when the Government rested. His appeal assigns error to the denial of this motion and to portions of the court's charge to the jury.

With respect to denial of acquittal, the contention is that defendant's possession of the goods with guilty knowledge was not proven. Looking at the evidence in the light most favorable to the prosecution, as we must on a motion for acquittal, we think that the issue was properly left to the jury's determination. The evidence established that a shipment of 607 cases of rubber floor tile left Waltham, Massachusetts, on Friday, January 25, 1957 for transportation by trailer truck to New York City. On Saturday and Sunday the truck laid over at the carrier's terminal in Wallingford, Connecticut. On Monday the truck proceeded to its destination in New York, where it was found that 102 cases of the shipment were missing. Even before the carrier knew that these cases were missing, they had been discovered by the police of North Haven, Connecticut, which is only a few miles distant from Wallingford, at four o'clock in the morning of Monday, January 27, on premises of, or adjacent to, the house where

appellant lived.[1] The police had been summoned by a neighbor who was alarmed by hearing the noise caused by unloading the tile from a motor vehicle on the premises of appellant's residence. When the police arrived they found a partially unloaded suburban type truck in which were 21 cases of the stolen tile. The other 81 cases were in a chicken coop on the lot adjacent to appellant's residence. The motor of the suburban truck was still warm and the keys were in the ignition. No person was seen in the truck or coop, and the police made no inquiry at the time at appellant's house. The truck was registered in appellant's name, and not long before January 27 he had asked permission to use the coop to store furniture, and had obtained scrap lumber for the purpose of boarding up the coop windows. There was also testimony that a padlock had recently been put on the coop door, but no direct evidence proved who put it on or who had a key to unlock it. Subsequent to finding the stolen tile, several police officers and an FBI agent talked with appellant. They testified that he said he knew nothing about the tile, that he had rented the coop to one Chick Jameson, "address unknown, who he met casually," for $25.00 a month, and had also rented the suburban truck to him for $10.00; that he also said he was playing poker on the morning the tile was found by the police, with Mickey Zello (called "Mickey Mouse") and two unknown men at the Blue Bell Club on Grand Avenue. The police made some attempt, without success, to find Jameson and Zello. There is no indication that they went to the Blue Bell Club to check appellant's alibi.

Appellant's brief, page 7, concedes that it might be inferred from the facts proven "that whoever had used the truck at the time in question had been guilty of the crime of possessing stolen goods," but it is argued that the evidence fails to point to McNeil

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[1]Both counsel and witnesses referred to the time the goods were discovered by the police as being 4:00 A. M., Monday, January 27. In fact Monday was January 28. The mistake in date is not significant.

as that person. We think the evidence sufficient. The truck was his and there was credible evidence that he had been given exclusive possession of the coop. Of course the jury was at liberty to disbelieve appellant's statements to the police that the coop and truck had been rented to Chick Jameson, "address unknown, who he met casually." If his statements were disbelieved, the jury could reasonably conclude that appellant had exclusive possession of the tile found in the car and the coop. From the fact that the tile was put into the coop at 4:00 A. M. guilty knowledge on the part of the possessor might readily be inferred. The court charged correctly as to the essential elements of the crime; and the jury's verdict in our opinion is supportable, despite counsel's able argument to the contrary.

With respect to alleged errors in the charge little need be said. Exception was taken to the word "then" in the court's reference to "the evidence that there was then a padlock on the coop," the defendant arguing that there was no evidence as to the padlock being there at the time the goods were found in the coop. But the court repeatedly instructed the jury that their recollection of the evidence was to control. We see no merit in this exception.

The other portion of the charge claimed to be erroneous are the following:

> "They [the Government] apparently ask you to consider statements made by the defendant as to the use of the car by one Jameson, and the efforts made by the police and government agents to locate a person by that name, and the failure to do so, in order to ask that you infer that that [sic] was no such person in existence, and that that explanation of the possession by another of the car is without foundation. The Government asks you to draw those inferences.
>
> "As I have said, it is for you to determine whether you may reasonably draw such inferences from the facts which you do find to have been established in that case as to what

search actually was made, and whether there was any such person thoroughly searched for, and not found, and whether the statement was made by the defendant."

It may be, as the appellee argues, that the exception taken was not specific enough to call the court's attention to the precise nature of the alleged error.[2] But however that may be, we think the charge was correct. It left to the jury the inferences to be drawn from the evidence.

Judgment affirmed.

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[2]The exception reads: "It is also our claim that the fact that the police testified that he named certain persons whom they were not able to find, cannot be considered against the defendant at this time." Compare Rule 30 F. R. Cr. P.; *Polmer* vs. *Hoffman*, 318 U. S. 109, 119; *Nabob Oil Co.* vs. *United States*, 10 Cir., 190 F 2d 478, 479.

APPENDIX B

That Testimony Concerning the Padlock

(Examination of Edward Halkovetz, a patrolman of the North Haven Police Department.)

(29)* Q. Whether or not you were so employed on or about the 27th day of January of this year? A. Yes, I was.

Q. Whether or not in the course of your employment you received a call to proceed to the area of Quinnipiac Avenue between 65 and 69 Quinnipiac Avenue? A. I did.

[Patrolman Halkovetz related the details of his investigation which revealed the tile which was found in the truck and chicken coop.]

(33) Q. Whether or not you could tell from your investigation as to whether this coop, as you have described it, was locked at any time? A. That I could not truthfully say.

(Examination of Gilbert Hough, who testified that in early January, 1957, the appellant had asked him for some scrap lumber to put over the windows of the chicken coop.)

(68) Q. Preceding this request, was it usually kept locked?

Mr. Israel J. Jacobs. Objected to, your Honor. It is not relevant.

Mr. Flynn. I will withdraw the question.

By Mr. Flynn.

Q. Whether or not there was any other change, to your knowledge, in this building subsequent to this request for materials by the defendant?

Mr. Stanley A. Jacobs. Object, unless it appears that the

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*Figures in parentheses refer to pages of the original record.

defendant made the change or it was made at the defendant's request.

The Court. Overruled.

By Mr. Flynn.

Q. You may answer the question. A. After our conversation?

Q. Yes. A. I did notice at one time that there was a padlock on the door.

Q. Had it been padlocked before? A. For some time, no.

Mr. Flynn. You may inquire.

Cross-examination By Mr. Israel J. Jacobs.

(69) Q. I understood you to say that you noticed the padlock on the chicken coop at one time? A. Yes.

Q. Do you know how long that padlock was on that chicken coop? A. No, I couldn't say how long it was on there, no.

Mr. Israel J. Jacobs. That's all.

Redirect Examination by Mr. Flynn.

Q. Was this coop padlocke[d] prior to your conversation with the defendant for a period of, say three months?

Mr. Stanley [A.] Jacobs. If he knows.

By Mr. Flynn.

Q. If you know. A. Well, I am not sure, I don't know.

Q. Well, search your memory, sir.

Mr. Stanley A. Jacobs. He says he was not sure, and I think he added he doesn't know.

A. I don't know that it wasn't padlocked for three months.

By Mr. Flynn.

Q. Do you know whether or not it was under padlock for any length of time? (70). A. I know the door stood open for some

time before that. It was just swinging open. I couldn't say for what length of time.

Mr. FLYNN. I have no further questions.

Mr. ISRAEL J. JACOBS. No questions.

THAT TESTIMONY CONCERNING CHICK JAMESON

(Examination of Arthur Kane, a sergeant of the North Haven Police Department.)

(45) Q. Did you participate in any questions or examination of the accused? A. I did.

(46) Q. Did the accused tell you how the tile got there? A. No. He said he didn't know how it got there. He stated that the chicken coop was rented by him to a Mr. Chick Jameson, address unknown, who he met casually, for $25 a month. He stated he did not use his suburban, but maybe Mr. Jameson did. * * *

Q. Whether or not you made an investigation to find the person? A. Yes, we did, and we could not locate him. * * *

(47) Q. Were you able to locate him, Sergeant? A. We were not.

(Examination of Thomas J. Nerreau, a sergeant of the North Haven Police Department, testifying as to his participation in an interrogation of the defendant.)

(74) Q. There was testimony as to the rental of this chicken coop. Do you recall that testimony? A. Yes, sir.

Q. Did the defendant ever refer to anyone as having rented that chicken coop in your presence? A. Yes, sir.

Q. To whom? A. Chick Jameson.

Q. Did he describe this gentleman? A. Partially, yes.

Q. How did he describe him? A. I don't remember the exact way he described him. * * *

Q. Did he describe the terms of this rental agreement? A. Yes, sir.

(75) Q. What were they? A. He rented the coop for $25 a month.

Q. Did he rent anything else? A. He rented the station—excuse me—the suburban. He said he rented that to Jameson for $10.

Q. He told you that he rented his station wagon for $10? A. Yes, the suburban.

Q. Did you make any attempt yourself, Mr. Nerreau, to locate any of the people that the defendant advised you were with him or this man Jameson? A. Yes, sir.

Q. Were you successful? A. No, sir.

(Examination of Francis X. Fust, Special Agent of the Federal Bureau of Investigation.)

(81) Q. Mr. Fust, there has been testimony about one Chick Jameson. Were you present in Court when that testimony was given? (82) A. Yes, sir.

Q. In the process of your investigation of this floor tile matter, whether or not you attempted to find Chick Jameson? A. Yes, I did.

Q. What method did you use, sir? A. We checked records of the New Haven Police Department, the information available to the officers of that department, and the city directories, with no results.